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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

ADMINISTRATIVE MOTION FOR ORDER COMPELLING DEFENDANTS TO COMPLY WITH CIVIL LOCAL RULES 7-3(A) AND 3-4(C)(2)

Pursuant to Civil Local Rule 7-11, Plaintiffs, by and through their counsel, respectfully submit this Administrative Motion for an order compelling Defendants to comply with Civil Local Rules 7-3(a) and 3-4(c)(2) governing contents and format of papers and also with the carefully planned briefing schedule agreed by the parties and approved by the Court. In addition to their 25-page Opposition to Plaintiffs' Motion for Class Certification ("the Opposition") (Dkt. No. 209), Defendants simultaneously filed a 22-page Motion to Strike the Report of Dr. Edward E. Leamer ("the Motion to Strike"). Dkt. No. 210.

Defendants' "motion to strike" is procedurally improper under both Civil Local Rule 7-3(a) and the Federal Rules of Civil Procedure. It is an obvious and prohibited attempt to circumvent the page limit for their Opposition, as set by the Local Rules and confirmed by the Court.[1] Defendants' Motion to Strike would also require Plaintiffs to file a separate and expedited response not only to the motion but to the 78-page report of Dr. Murphy, on which it relies, in contravention of the briefing scheduled agreed to by the parties and approved by the Court. In addition, Defendants have used a "narrower," non-standard typeface in their Opposition in order to squeeze in over one-and-a-half pages of argument beyond the allotted 25-page limit. *See* Civil Local Rule 3-4(c)(2).

Plaintiffs respectfully request that the Court order Defendants to file a single opposition brief that complies with the twenty-five page limit and briefing schedule previously negotiated by the parties and set by this Court, and further order that the Clerk discard or return to Defendants the briefs on file. Alternatively, Plaintiffs respectfully request that the Court allow Plaintiffs to file an additional twenty-two responsive pages in their reply in support of their Motion for Class Certification and order that Defendants may file no further papers in support of their "motion to strike." As a third alternative Plaintiffs request a briefing schedule as outlined below.

A. Defendants' Motion To Strike Should Be Rejected Because It Is Procedurally Improper.

First, Defendants' Motion to Strike violates Civil Local Rule 7-3(a), which states, "Any

[1] This Court firmly set the page limits for Plaintiffs' Motion for Class Certification, Defendants' opposition, and Plaintiffs' reply, per the local rules, at the June 4, 2012 case management conference. *See* Dkt. No. 226 at 64:17-19 ("25 page max on the opening and the opposition; and then 15 max on the reply[.]")

evidentiary and procedural objections to the motion must be contained within the brief or memorandum." Defendants' Motion to Strike is plainly an evidentiary objection: it asks the Court to strike Dr. Leamer's report "for his failure to provide reliable, relevant and admissible testimony under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and Federal Rule of Evidence 702." Defendants' Motion to Strike at 1:8-10. The remainder of the brief simply summarizes at length various criticisms offered by their expert, Dr. Murphy, and asserts additional legal argument in support of that evidentiary objection. The purpose of Rule 7-3(a) is to prevent parties from evading the page limitations on their opposition briefs by filing separate evidentiary objections to material contained in the opening brief. Courts routinely discard such improper maneuvers. *See, e.g., Adams v. Kraft*, 828 F. Supp. 2d 1090, 1100 (N.D. Cal. 2011) (Koh, J.) ("[B]ecause Defendants did not comply with Local Rule 7-3(c), which requires all evidentiary and procedural objections to the opposition to be contained within the reply brief or memorandum, the Court will not consider Defendants' separate evidentiary objections.");[2] *Oak Point Partners, Inc. v. Lessing*, No. 11-03328 LHK, 2012 U.S. Dist. LEXIS 133407, *3 n.2 (N.D. Cal. Sept. 18, 2012) ("Defendant also filed two sets of evidentiary objections to declarations filed in support of Plaintiffs' opposition. Civil Local Rule 7-3(a) requires that '[a]ny evidentiary and procedural objections to the motion must be contained within the brief or memorandum.' Defendant's objections were filed separately, and thus do not comply with this rule. Accordingly, the Court strikes these objections and will not consider them."); *Johnson v. Lockheed Martin Corp.*, No. 11-01140 LHK, 2012 U.S. Dist. LEXIS 99187, *9-10 (N.D. Cal. July 17, 2012) (striking Plaintiffs' evidentiary objections for failure to comply with Local Rule 7-3); *Yates v. Delano Partners, LLC*, No. 10-3073 CW, 2012 U.S. Dist. LEXIS 149708, *4-5 n.2 (N.D. Cal. Oct. 17, 2012) (same); *Gauntlett v. Ill. Union Ins. Co.*, No. 11-00455 EJD, 2012 U.S. Dist. LEXIS 131086, *30 n.4 (N.D. Cal. Sept. 13, 2012) (same).

Defendants will no doubt protest that they have filed a "motion to strike," not objections.

[2] Civil Local Rule 7-3(a) pertains to opposition briefs; Rule 7-3(c) to reply briefs. Both contain the provision that "[a]ny evidentiary and procedural objections to the motion must be contained within the brief or memorandum." Because Defendants filed their Motion to Strike with their opposition to Plaintiffs' Motion for Class Certification, Rule 7-3(a) applies here, but case law applying 7-3(c) to reject separate evidentiary objections is equally on point.

Allowing parties to avoid Rule 7-3(a) by renaming their papers would nullify the rule. Significantly, the Federal Rules of Civil Procedure do not authorize a motion to strike an expert report. Motions to strike are only recognized by Federal Rule of Civil Procedure 12(f), and then only as to **pleadings**: Rule 12 states that, "The court may strike from a **pleading** an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. Pro. 12(f) (emphasis added). It is hornbook law that a declaration in opposition to a class certification motion is not a pleading. As explained by MOORE'S,

> Only material included in a 'pleading' may be the subject of a motion to strike, and courts have been unwilling to construe the term broadly. **Motions, briefs or memoranda, objections, or affidavits may not be attacked by the motion to strike**.

2-12 MOORE'S FEDERAL PRACTICE - CIVIL § 12.37 (citations omitted) (emphasis added); *see also Lamon v. Adams*, No. 09-00205 LJO, 2011 U.S. Dist. LEXIS 143871 (E.D. Cal. Dec. 13, 2011) ("Only pleadings are subject to motions to strike; improper motions, declarations or other material not contained in pleadings cannot be stricken under Rule 12(f)."") (citing *Sidney -Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983); *Lombard v. MCI Telcoms. Corp.*, 13 F. Supp. 2d 621, 625 (N.D. Ohio 1998) ("[T]here is no basis in the Federal Rules [to] employ[] Rule 12(f) to strike an affidavit or portions thereof … a Court should disregard inadmissible evidence, not strike that evidence from the record.") (internal citations and quotations omitted).

Allowing Defendants' "motion to strike" would also flatly contradict the briefing schedule agreed to by the parties and ordered by the Court and create procedural mischief. Allowing the motion would in theory require Plaintiffs' expert to submit yet another separate declaration in advance of Plaintiffs' deadline to submit reply papers. And Defendants insist that they would be entitled to a reply brief in support of their motion to strike—in reality an unpermitted sur-reply. Allowing the motion would thus double or perhaps triple the papers before the Court and modify the schedule unfairly to the detriment of Plaintiffs. When Plaintiffs raised these objections to Defendants yesterday, Defendants proposed the following solution, which they claimed they had always "envisioned": Plaintiffs could file a combined reply/opposition but then Defendants would file yet another brief (a "reply" in support of their motion) after all the other papers had

been submitted to the Court. Declaration of Brendan P. Glackin ("Glackin Decl.") ¶ 2. This would permit Defendants to extend the briefing schedule and file a sur-reply. Today, Defendants offered a different proposal, namely that Plaintiffs file their opposition December 3, 2012, and Defendants file their reply December 10th. *Id*. This deadline is impossible to meet as a practical matter, effectively advancing by a week during the holiday season Plaintiffs' deadline to respond to the Murphy report and breaking in two Plaintiffs' responses to the class certification opposition.

Defendants never met and conferred with Plaintiffs regarding their intent to file the motion nor did they request permission to do so from the Court. Remarkably, Defendants claim that they "could not have known" they might want to make such a motion at the time the parties agreed to the briefing schedule. Glackin Decl. ¶ 2.[3] In fact, the Court has previously ordered Daubert briefing in conjunction with dispositive motions. *See, e.g.*, Dkt. No. 94 (Transcript of October 26, 2011 Case Management Conference) at 88:24-89:2; Dkt. No. 226 (Transcript of June 4, 2012 Case Management Conference) at 59:7-25; *id*. at 64:5-67:24; Dkt. No. 184 (Transcript of September 12, 2012 Case Management Conference) at 19:18-21:6. If Defendants believed they needed additional pages to make *Daubert* arguments after reading Dr. Leamer's report, or taking his deposition, they have had ample time to make that request to the Court. Instead, they set off a fire drill with an unauthorized motion requiring an opposition to be filed on the Monday after Thanksgiving. The "motion to strike" should be returned to Defendants as non-compliant. Alternatively the Court should allow Plaintiffs twenty-two additional pages in their reply brief and order that no further papers shall be filed by Defendants. If the Court allows the motion and a reply by Defendants, Plaintiffs request permission to file a combined 37-page opposition on December 10, 2012, with Defendants to file a reply at noon on December 17, 2012, and Plaintiffs to file a sur-reply on December 21, 2012. To be clear, Plaintiffs do not prefer this last procedure,

[3] Defendants also stated that their motion is authorized by *Ellis v. Costco Wholesale Corp.*, No. 04-3341 EMC, 2012 U.S. Dist. LEXIS 137418 (N.D. Cal. Sept. 25, 2012). Glackin Decl. ¶ 2. However, the plaintiffs in *Ellis* did not object to defendants filing a *Daubert* motion along with their opposition to class certification, so the propriety of that approach was not tested. Accordingly, *Ellis* is not authority for Defendants' position that such an approach is proper under the Local and Federal Rules.

which would unreasonably burden the Court with voluminous additional papers and delay the Court's ability to close the briefing and consider the motion, but it at least would level the playing field.

B. Defendants' Opposition To Plaintiffs' Motion For Class Certification Should Be Rejected Because It Violates Local Rule 3-4(c)(2).

In addition to the "motion to strike," Defendants' Opposition should also be returned to them because it does not comply with the typeface requirements of the Northern District of California. Unlike their other filings, Defendants submitted the Opposition in Garamond font for the apparent purpose of extending the effective length of their brief by one-and-a-half pages.

Local Rule 3-4(c)(2) provides: "Printed text may be proportionally spaced, provided the type may not be smaller than 12-point standard font (e.g., Times New Roman)."[4] Defendants' Opposition as-submitted goes to the very last line of the twenty-fifth page. Plaintiffs instructed a professional word processor to create a version of the Opposition, omitting tables, identical in all respects to the original. Glackin Decl. ¶ 4. The word processor then converted the font of the document from Garamond to Times New Roman. A true and correct copy of this document is attached as Exhibit A to the Glackin Declaration. It is over 26.5 pages of text. All other papers filed appear to be in standard Times New Roman. Defendants offered no explanation for this discrepancy. Glackin Decl. ¶ 3.

* * *

For the foregoing reasons Plaintiffs' administrative motion should be granted.

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[4] Garamond font does not comply with this standard; it has a history among writers seeking to manipulate page limits. A forum discussion on the website of The Chronicle of Higher Education is instructive. A poster seeks help finding "a nice, easily readable font that is a little bit smaller than Times New Roman" in order to comply with a page limit. Glackin Decl. Ex. B. One poster suggests Garamond: "It is a slenderer font with less kerning (space between letters) and will usually reduce the page count nicely[.]" *Id.* A third poster casts doubt upon this tactic:

> Looking for a smaller font to print something for which you're given a page limit is the same trick used by undergrads who supply 2" margins triple-spaced to give you a ten page paper – and the editor appreciates it just about as much as you do when an undergrad pulls this in your class.

Id.

Dated November 15, 2012

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